

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOSE HERNANDEZ
Claimant

VS.

MONFORT, INC.
Self-Insured Respondent

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Docket No. 225,823

ORDER

This case comes before the Board on remand from the Court of Appeals. The Court of Appeals' opinion was filed March 1, 2002. The Kansas Supreme Court denied a petition for review on June 12, 2002.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Board had determined in an Order of March 30, 2001, that claimant was entitled to permanent partial disability benefits based upon a 10 percent whole body impairment of function but was not entitled to a work disability. The Board also calculated claimant's average weekly wage based upon a 48-hour work week because claimant occasionally worked 6-day weeks and was required to keep Saturdays open and available for work. The claimant appealed the Board's decision.

The Court of Appeals affirmed the conclusion that claimant was not entitled to a work disability but reversed the finding that claimant's average weekly wage should be calculated based upon a 48-hour work week. The Court of Appeals instead determined the claimant normally worked a 5-day week and the contract between the respondent and the union listed the basic work week as 40 hours. The Court of Appeals remanded the case to the Board with instructions to calculate claimant's pre- and post-injury wage using a 40-hour work week instead of a 48-hour work week.

The Board's finding concerning claimant's percentage of permanent partial disability was affirmed by the Court of Appeals. On remand, the only issue before the Board is the re-calculation of the claimant's average weekly wage using a 40-hour work week.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The claimant's hourly rate on the date of accident was \$10.40. The hourly rate times 40 hours per week yields \$416. The average weekly overtime is the total amount earned by the employee in excess of the amount of straight-time money earned by the employee during the 26 calendar weeks immediately preceding the date of the accident.¹ Based upon Exhibit 4 to the Transcript of Proceedings, dated December 13, 1999, the claimant's overtime in excess of the amount of straight-time money totaled \$2,081.67. This sum divided by 26 equals an average weekly overtime of \$80.06. The straight-time weekly rate plus the overtime yields a total gross average weekly wage of \$496.06.

The re-calculation of the claimant's average weekly wage requires a modification of the Administrative Law Judge's Award because this re-calculated average weekly wage results in a different payment rate for weekly compensation under the Award.

The determination of the payment rate for the weekly compensation for permanent partial general disability is either the lesser of the amount determined by multiplying the average gross weekly wage prior to injury by 66⅔% (\$496.06 x .6667 = \$330.72) or the maximum provided in K.S.A. 44-510c.² The maximum weekly compensation provided by K.S.A. 44-510c for the claimant's accident date of October 15, 1996 was \$338. Because the weekly payment rate based upon the re-calculated average weekly wage is less than the maximum provided in K.S.A. 44-510c, the Award must be modified and the compensation calculated based upon a weekly payment rate of \$330.72.

It was undisputed at the time of the regular hearing that claimant's hourly rate was \$10.50. The hourly rate times 40 hours per week yields \$420. Accordingly, the post-injury gross average weekly wage was \$420.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated June 19, 2000, is hereby modified to reflect an average weekly wage of \$496.06.

¹K.S.A. 44-511(b)(4)(B)(iii).

²K.S.A. 44-510e (a)(1).

The claimant is entitled to 14.14 weeks of temporary total disability compensation at the rate of \$330.72 per week or \$4,676.38 followed by 23.86 weeks of temporary partial disability compensation or \$7,890.06 and 39.20 weeks at \$330.72 per week or \$12,964.22 for a 10 percent permanent partial general disability, making a total award of \$25,530.66 which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of September 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Terry Malone, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge
Director, Division of Workers Compensation